Certainly there is nothing inconsistent in the contention that information obtained by a "mail watch" ought to be limited to intra-departmental use. Such investigations may be useful for many purposes within the postal establishment, including the two powerful statutory remedies of the Postmaster General to refuse to deliver mail to anyone engaged in conducting a lottery or using the mail to obtain money under false or fraudulent pretenses, 39 U. S. C. Section 259, and the companion sanction in Section 732, 39 U. S. C., to forbid the payment of a postal money order to such person. Both of these provisions authorize the Postmaster General to act upon evidence satisfactory to him. His subordinates responsible for obtaining such evidence are the postal inspectors. It is manifest, therefore, that the contemplation of a valid "mail watch" does not lead to the conclusion that information so derived can be used outside the postal establishment.

The Bureau of the Chief Postal Inspector is an extensive sub-organization within the Post Office Department. Throughout the country there are fifteen regional offices with a Postal Inspector in Charge at the head of each office. 39 C. F. R. Section 5.2 (Supp. 1960). Under the Postal Inspector in Charge are postal inspectors, divided into ten grades. 39 U. S. C. Section 865(b) (Supp. 1959). The primary duties and responsibilities of the postal inspectors are set forth in 39 U. S. C. Section 963(32) (Supp. 1959) (Appendix A, *infra*, p. 18, fn. 1).

Most of the assigned tasks of a postal inspector deal with internal affairs and operations of the postal service. The inspectors are the investigative and auditing staff of the Postmaster General to insure that personnel of the postal establishment are complying with postal laws and operating procedures. They deal with operating problems and advise on the needs for postal offices and stations. They are also charged with maintaining liaison with branches of federal and state law enforcement agencies.

The opinion of the Court of Appeals specifically quoted that part of the statutory job description which states that

an inspector, in selected cases, "in any criminal investigation, develops evidence, locates witnesses and suspects; apprehends and effects arrests of postal offenders, presents facts to the United States attorney, and collaborates as required with Federal and State prosecutors in presentation before United States commissioner, grand jury, and trial court." (Appendix A, *infra*, p. 18, fn. 1).

This provision clearly contemplates that postal inspectors will cooperate with law enforcement officers and will present facts to the United States Attorneys. But, there is nothing in this section which authorizes, or even suggests, that a postal inspector shall turn over information obtained through a "mail watch". Postal inspectors have many ways to investigate and gather data other than a "mail watch" and it does not follow that a general job description contravenes a specific command that first class mail shall be "accorded absolute secrecy" and that information obtained from a "mail watch" shall not be disclosed (Appendix D, *infra*, pp. 24, 26).

A "mail watch" is in any circumstance an odious invasion of privacy. There may be some justification for use of this snooping technique within the Post Office Department to attempt to guard against abuse of the mails. But to go beyond and use the Government's monopoly over the mails to gather evidence to support a criminal prosecution is unjustifiable. The Postal Regulations plainly embody this distinction between intra-departmental and general use of such evidence. By its decision, the court below has given postal inspectors the power to disclose matters learned through a "mail watch" to anyone at any time for any purpose, a power manifestly sought to be avoided by the changes made in the Regulations.

2. This Court has confirmed the policy in the federal courts to refuse to admit into evidence information acquired in violation of the law by federal officers. *Elkins v. United States*, 364 U. S. 206 (1960). In 1914, the Supreme Court held that evidence secured in contravention of the Fourth

Amendment must be suppressed. *Weeks v. United States*, 232 U. S. 383 (1914). The exclusionary rule has not been limited to situations involving a breach of the constitutional mandate. *Nardone v. United States*, 302 U. S. 379 (1937); *Draper v. United States*, 358 U. S. 307 (1959). Similarly, the exclusionary rule has been invoked to suppress evidence acquired in violation of the Federal Rules of Criminal Procedure. *McNabb v. United States*, 318 U. S. 332 (1943); *Mallory v. United States*, 354 U. S. 449 (1957).

The policy of exclusion encompasses not only the information directly acquired by illegal action, but also reaches other evidence derivatively acquired through the tainted matter. *Nardone v. United States*, 308 U. S. 338 (1939).

The evidence in this case is tainted. It was acquired by the prosecuting officers through a violation of the law. Under well-established principles enunciated by this Court, the evidence ought to have been suppressed below. The District Court [1] reached a contrary conclusion on the ground that the taint in this case derived from breach of a Regulation of the Postal Department of the United States, and therefore the well-recognized principles of exclusion of tainted evidence are not operative.

In support of its holding, the District Court pointed out that (53a) ". . . because regulations are said to have the force of law for one purpose does not mean that they will be accorded like treatment for all purposes," citing *United States v. Eaton*, 144 U. S. 677 (1892). That case held that a regulation could not create and define the elements of a crime for which an individual could be prosecuted. It might be noted that a rule of court could not "legislate" a new criminal offense.

The Court of Appeals for the Eighth Circuit, in *Oliver v. United States*, 239 F. 2d 818 (1957), held that evidence obtained in violation of an express mandate of the Postal Regulations must be suppressed. In that case, postal offi-

1. This issue was not reached by the Court of Appeals.

cials opened a package and discovered the presence of heroin. Their action was in direct contravention of Section 331.12 of the Postal Manual, which directed in general terms that the seal of first class mail must not be broken, without limitation as to whom the direction applied.

In reaching its conclusion, the Court of Appeals cited as collateral authority both regulations and statutes permitting the opening and inspection of mail other than first-class. These inferentially, to some extent, support the conclusion that first-class mail is not subject to examination. But there was no statute which directly forbade inspection of first-class mail. The Regulation in the Postal Manual, on the other hand, did so in unequivocal language.

Because the Eighth Circuit cited the collateral authority of statutes dealing with other classes of mail, the District Court below found the *Oliver* case distinguishable. To say that the Eighth Circuit utilized "a combination of statutory and administrative restrictions" as the ground for its decision is an insufficient reading of the case. Plainly enough, the governing consideration was the Regulation, Sec. 331.12 of the Postal Manual, which squarely controlled the situation before the court.

The critical inquiry in a case like the present one is whether the law in question, whatever its source, is sufficient to bind the officers of the Government to obey. In *Vitarelli v. Seaton*, 359 U. S. 535 (1959), and *Service v. Dulles*, 354 U. S. 363 (1957), the Secretary of Interior and Secretary of State discharged employees of their respective departments. In both cases, the discharges were accomplished in violation of regulations issued by the department concerned. This Court held that failure to follow the regulations made the discharges null and of no effect.

These cases are in the same line as *United States ex rel. Accardi v. Shaughnessy*, 347 U. S. 260 (1954), where the Supreme Court held that the Attorney General, having issued regulations and established procedures governing requests for suspension of deportation, must comply with those regulations as long as they remain operative.

Mr. Justice Frankfurter summed up the point in these words: "An executive agency must be rigorously held to the standards by which it professes its action to be judged". *Vitarelli v. Seaton, supra* at 546. In the *Service* case, Mr. Justice Harlan wrote: "[R]egulations validly proscribed by a government administrator are binding upon him as well as the citizen, and . . . this principle holds even when the administrative action under review is discretionary in nature". *Service v. Dulles, supra* at 372.

The District Court declared that the Postal Department is free to choose not to enforce its regulations (52a). Nothing could be more clearly contrary to the Supreme Court decisions in *Accardi, Service* and *Vitarelli*.

The Postmaster General issued the regulation embodied in part 311.6 of the Postal Manual. This regulation was binding upon all representatives of the Postal Department, including Postal Inspector Hillegass. This regulation expresses the standard by which the Postal Department professes its action to be judged. This regulation was undisputedly violated. Because Postal Inspector Hillegass directly breached the clear standard of part 311.6, the evidence obtained against appellant ought to be suppressed.

The District Court concluded that the very regulation in question merely expresses a departmental policy. As such, according to the lower court, it does not carry much weight in striking a balance between the relevant interests of society.

It is difficult, if not impossible, to discern any interest of the Postal Department which underlies the prohibition against the "mail watch". The primary interest at stake is the right of the individual to be free from prying and snooping into his private affairs. The Postal Department may be concerned to the extent that the department would be severely and justly criticized if it used its monopoly power to invade the privacy of its customers. It was therefore extremely prudent for the Postmaster General to issue the regulation in question. But that regulation will

be a virtual fraud if, at any time someone in the department chooses to do so, it may be evaded and violated."

There is something of a paradox in the District Court's concession that the mail of a United States Senator ought to be free from the snooping of a "mail watch", but the ordinary citizen cannot claim such a privilege. If the right here in question has any significance for a Senator, it is a right which belongs to everyone.

The District Court suggested that there is no necessity to invoke the exclusionary rule to compel compliance with the regulation, because the Postal Department is "uniquely capable of enforcement" (52a). Now, it does seem a rather remote possibility that a Postal Inspector would be disciplined for maintaining a "mail watch" since, as demonstrated, there are no interests of the Department at stake. The aggrieved person is the one whose mail is "watched", and *he is uniquely incapable of requiring enforcement of the regulation.* Only through the intervention of the courts, by refusing to accept the poisoned fruit, can the prohibition of the "mail watch" be made meaningful.

It goes without saying that petitioner does not urge this Court to hold that a violation of *any* departmental regulation should result in application of the exclusionary rule. The only regulation in issue is that dealing with "mail watches". This does express an important policy of respect for the privacy of persons using the United States mails. So long as that regulation is in force, it ought to be rigorously enforced. The Government contention, in effect, leaves it at the whim of a Postal Inspector whether this professed policy will be followed.

The only way to make the regulation mean what it says is to exclude evidence obtained in violation of its mandate.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for Petitioner.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,210

UNITED STATES OF AMERICA

v.

SAM SCHWARTZ,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 9, 1960

Before BIGGS, *Chief Judge*, and HASTIE and FORMAN, *Circuit Judges*

OPINION OF THE COURT

(Filed October 6, 1960)

By BIGGS, *Chief Judge*.

The appellant, Schwartz, was convicted of using the mails to defraud, 18 U.S.C.A. § 1341, solely on the basis of evidence produced by a "mail watch" placed by Hillegas, a postal inspector of the United States Post Office Department, on first class mail addressed to Schwartz. A "mail watch" or "mail cover" consists of the compiling

of a record by a letter carrier of information appearing on the face of envelopes of letters addressed to specified persons. In the present case the procedure was successfully used to discover the names of Schwartz's victims which were then furnished to the Department of Justice by postal inspectors for the purpose of instituting criminal proceedings. The sole issue presented for our determination is whether this evidence was properly admissible against the appellant. A motion was made by the appellant to suppress the evidence thus obtained and was denied. 176 F. Supp. 613. At trial this motion was renewed, was again denied, and the questioned evidence admitted. The appellant was convicted and the appeal at bar followed.

The appellant contends that the information obtained through the "mail watch" was furnished to the Justice Department in contravention of certain Postal Regulations hereinafter set out and discussed, and that evidence so communicated to the Justice Department is inadmissible in a criminal proceeding. The court below concluded that the communication of the information by the postal authorities was in fact prohibited by the Postal Regulations, but concluded that evidence obtained as a result of a violation of such Regulations was admissible in a federal court. We agree that the evidence was admissible, but for the reason that there was no violation of Postal Regulations.

The Postal Regulations in existence prior to those in effect at the critical dates in the case at bar provided:

"Section 41.4—Giving Information About Mail Matter.

"(a) *Restriction.* Postmasters and others in the postal service shall not give to unauthorized persons information concerning mail matter. They shall furnish such information to post-office inspectors and may furnish it also to the sender, the addressee, or the authorized representative of either, when satisfactory identification has been established and the request is limited to information proper for the applicant to receive. Postmasters may give to

officers of the law, upon proper identification, to aid in the apprehension of fugitives from justice, information regarding the addresses, return cards, or postmarks on mail matter, but shall not withhold such mail from the addressees or delay its delivery. If the information so given to such officers relates to a violation of the postal laws, the postmaster shall report his action immediately to the inspector in charge of the division in which his office is located.

"(b) *Exception for Official Request.* Upon official request of a representative of another executive department, agency or independent establishment of the Federal Government and the presentation of proper credentials, postmasters may, when practicable, furnish for official use information regarding the addresses, return cards, or postmarks on mail matter, provided the labor involved in complying with the request does not interfere with postal business, or result in material cost. Such mail shall not be withheld from the addressee nor delayed in delivery. When a postmaster is in doubt as to the advisability of complying with such a request, or material cost is involved, he should write to the First Assistant Postmaster General for instructions, except that in cases involving registered, insured, or collect-on-delivery mail he should submit the question to the Third Assistant Postmaster General, Division of Registered Mail."

In 1954, disclosure was made that the Postal Department had conducted a "mail watch" on the mail of a United States Senator and had turned over information compiled therefrom to the staff of a Senate Committee. A special Senate Subcommittee issued and forwarded to the Attorney General a report strongly disapproving the incident. S. Rep. No. 2510, 83rd Cong., 2d Sess. (1954), reprinted at 101 Cong. Rec. 2564 (1955). The Regulations were then redrafted and are set out in the current Postal Manual, parts 311.6 and 311.7. These parts provide:

"311.6 *Mail Matter.* Furnish information concerning mail or mailing permits to postal inspectors and to the sender, the addressee, or the authorized representative of either on proper identification. Do not give such information to others. . . ."

"311.7 *Concerning Fugitives.* Furnish to officers of the law, on proper identification, information regarding the addresses, return cards, or postmarks on mail to aid in the apprehension of fugitives from justice. Report the action immediately to the post office inspector in charge if the information furnished relates to a violation of the postal laws."

As to the procedure employed here the Regulations state:

"831.44 *Mail Cover.* Requests by postal inspectors in charge and postal inspectors for information regarding the addresses, return cards, or postmarks on mail, must be treated in strict confidence and complied with carefully and accurately. In obtaining the information, do not delay delivery of the mail."

The following Regulations of the Postal Department have also been cited by the appellant as pertinent:

(1) "Sealed first-class mail while in the custody of the Post Office Department is accorded absolute secrecy. No persons in Postal Service, except those employed for that purpose in dead-mail offices, may break or permit the breaking of the seal of any matter mailed as first-class mail without a legal warrant, even though it may contain criminal or otherwise unmailable matter, or furnish evidence of the commission of a crime." See Postal Manual, Part 113. (2) "The return address of the sender must be shown on the address side of mail to secure its return . . ." Postal Manual, Part 158.3. (3) "Dead Mail. . . . Treatment . . . At Dead Mail Office. Mail is examined and opened when necessary to find the name and address of the sender or addressee." See Postal Manual, Part 158.822a.

That these Regulations do not prohibit the "mail watch" procedure itself is plain. Indeed, part 831.44 contemplates requests by postal inspectors for information garnered in this method and directs compliance with such requests. It is also clear that part 311.6 restricts the class of persons who may be furnished information so obtained. Those persons who may receive it are identified as postal inspectors, the sender, the addressee, or the authorized representative of either. "[O]thers" may not be given such information. That the word "others" is broad enough to include the Department of Justice to which this information was given does not seem open to question.

The United States contends, however, that the prohibition as to who may furnish information contained in part 311.6 has no application to postal inspectors, and that since, in the present case, the evidence used to convict Schwartz was furnished to the Department of Justice by a postal inspector, it was not obtained in contravention of Postal Regulations. We agree that the prohibition contained in part 311.6 is not addressed to postal inspectors and that therefore the evidence in question was in no sense obtained illegally.

This conclusion would follow even if we were limited in our construction of part 311.6 to a bare examination of its words. Neither sentence contained in this part discloses the persons to whom its admonitions are addressed. But, the first sentence which is undoubtedly addressed to the same persons as in the second sentence, states to whom these addressees may furnish information. One class of persons so eligible consists of postal inspectors. Certainly, if postal inspectors were intended to be designated as among the persons to whom the admonitions of this part were addressed they would not have been included in the class of eligible recipients. Moreover, parts 311.6 and 311.7 appear in the Postal Manual in a subchapter referring only to the duties of a postmaster, and should thus normally be construed so as to restrict only his duties.

We need not, however, construe these provisions on their face, but may examine their history which in this case conclusively supports our conclusions. Section 41.4, the prior provision corresponding to what are now parts 311.6 and 311.7, was expressly directed to "[P]ostmasters and others in the postal service." That these "others" did not include postal inspectors is made clear by the nature of the three exceptions to its general prohibition of the furnishing of information concerning mail matter. First, as pointed out above in connection with the words of part 311.6, the existence of "post office inspectors" as an eligible class of recipients of such information belies an argument that these persons were also addressees of the prohibition. The second exception in Section 41.4 allowed "postmasters" to give to officers of the law, to aid in the apprehension of fugitives from justice, information concerning mail matter. Only postmasters were excepted for this purpose. Similarly, the now defunct subsection (b) of the prior section created an exception solely available to "postmasters". Thus, if the general prohibition of Section 41.4 extended to postal inspectors, as well as to postmasters and other employees, it would have been clear that postal inspectors were barred from furnishing information concerning fugitives and indeed all other information concerning mail matter, to law enforcement officers. Such an interpretation would be absurd in view of the fact that postal inspectors were then and remain the chief sources of aid and information in the Postal Department to officers of the law. See Section 9(b)(32)(k), Title 39, U.S.C.A.[1] Indeed, to construe the prohibition

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1. Section 9(b). Key positions; job descriptions; salary level

"(32) Position—Postal Inspector—Level 12.

"(k) In any criminal investigation, develops evidence, locates witnesses and suspects; apprehends and effects arrests of postal offenders, presents facts to United States attorney, and collaborates as required with Federal and State prosecutors in presentation before United States commissioner, grand jury, and trial court."

as extending to postal inspectors would be to attribute an anomalous purpose to the draftsmen; *viz.*, to limit postal inspectors more strictly than postmasters in furnishing information to persons outside the postal department. That such a construction is wholly unwarranted is further indicated by the fact that in the one case arising under Section 41.4 involving a "mail watch" no question was raised whether the furnishing of resultant information to the Department of Justice by postal inspectors was prohibited by the Regulations. See United States v. Costello, 255 F.2d 876 (2 Cir. 1958). Nor, as we understand his argument, does the appellant question the soundness of the decision in the cited case.

We conclude, therefore, that postal inspectors were not meant to be included in that class of postal employees limited by Section 41.4 in their use of information concerning mail matter.

It remains to consider whether the 1954 changes by their terms or intendment extended these Regulations to postal inspectors for if they did not so extend them at that time there is no basis for holding them applicable to the facts at bar. An examination of the 1954 amendments reveals that they consisted in the main of additions to and deletions of the words of Section 41.4. First, the initial sentence of Subsection 41.4(a) was excised. It is apparent that this change does not support any argument relevant to our present inquiry. Second, the addition of the sentence "[D]o not give such information to others", does not indicate in any way that the class of persons prohibited from giving "such information to others" was meant to be broadened. The only substantial change made in 1954 was the deletion of Subsection (b) of Section 41.4. That subsection, and the exception to the general prohibition contained therein, presumably had given the authority to local postmasters for the supplying of information to the staff of the Senate Committee. As pointed out above, however, that subsection

gave this authority solely to postmasters and its excision, therefore, could take away authority solely from postmasters. Thus, an examination of the literal changes that were made in 1954 gives no indication that they were intended as a restriction on the authority of postal inspectors who up until that time were clearly not within their scope. It follows that part 311.6 cannot be construed as prohibiting postal inspectors from furnishing information obtained by a "mail watch" to the Department of Justice.

This conclusion is consistent with the spirit as well as the wording of the 1954 changes assuming that they were brought on by the criticism of the Special Senate Subcommittee. The Subcommittee's report did not condemn the "mail watch" procedure generally and thus, did not even by implication, suggest a general ban on its use to detect and apprehend criminals.[2] Indeed, the changes that were made would seem responsive to the criticisms that were contained in the report. Postal inspectors were given exclusive authority to furnish information of the type involved in the 1954 incident to representatives of the federal government. Postmasters, due to the excision of

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2. The conclusion of the report was as follows:

"The committee received no testimony and no evidence to indicate that mail covers were ever maintained against any other Member of the United States Senate. In fact, the testimony indicates that it has never been done on any other occasion. The committee, however, finds it almost impossible to make an exhaustive finding on this point since a conclusive determination could be made only after examining the records of every post office in the Nation.

"Your committee desires in strong language to condemn the use of mail covers by a Senate committee or its staff.

"The committee's attention was directed to certain sections of the United States Code, sections 1701, 1702, and 1703, title 18, dealing with obstruction of mails, obstruction of correspondence, and delay or destruction of mail or newspapers. This committee has no authority to refer this matter to the Attorney General of the United States, but the committee recommends that the Senate refer the testimony and exhibits to the Attorney General for such action as he deems appropriate." 101 Cong. Rec. 2564 (1955).

subsection 41.4(b), may no longer do so.[3] Ordinarily the inspectors' duties and authority would not give them occasion to even possess information such as was involved in the 1954 incident since such information would seldom concern criminal investigation or internal departmental matters. In any event, such information when available, would be channeled through the postal inspectors' office. In this way a more effective check on the indiscreet use of information concerning mail matter was provided while law enforcement procedures were left substantially unhindered.

Since there was no violation of the Postal Regulations we need not consider the question whether evidence obtained in violation of such regulations would be admissible in a federal court. The motion to suppress having been properly denied and there being no other questions presented on this appeal, the judgment of the court below must be affirmed.

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3. The Committee report makes it plain that the offending disclosures there were made by local Postmasters and not postal inspectors.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13210.

UNITED STATES OF AMERICA

v.

SAM SCHWARTZ,

Appellant.

(District Court #19953 Cr.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: BIGGS, *Chief Judge*, and HASTIE and FORMAN, *Circuit Judges*.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

October 6, 1960.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13210.

UNITED STATES OF AMERICA
v.
SAM SCHWARTZ,
Appellant.

SUR PETITION FOR REHEARING.

Present: BIGGS, *Chief Judge*, and HASTIE and FORMAN, *Circuit Judges*.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By THE COURT:

BIGGS,
Chief Judge.

Dated: November 16, 1960.

APPENDIX D.

39 C. F. R.

Part 3—Mail Treated in Confidence [Revised]

Sec. 3.1 Mail treated in confidence. Sealed first-class mail while in the custody of the Post Office Department is accorded absolute secrecy. No persons in the Postal Service, except those employed for that purpose in dead-mail offices, may break or permit the breaking of the seal of any matter mailed as first-class mail without a legal warrant, even though it may contain criminal or otherwise unmailable matter, or furnish evidence of the commission of a crime. (R. S. 161, 396, as amended, sec. 1, 62 Stat. 782; 5 U. S. C. 22, 369, 18 U. S. C. 1717) [22 F. R. 4499, June 27, 1957.]

Part 4—Information on Postal Matters

* * *

Sec. 4.3 Privileged matter. The following records, documents, and information are privileged matter, and may not be disclosed by subordinate officers or employees of the Department without authorization:

(a) Reports of Postal Inspectors.

(b) Records of the Postal Inspection Service.

(c) Names of post office box holders.

(d) Names and addresses of post office patrons and former patrons, except as provided in Sec. 13.5 of this chapter.

(e) Records regarding mail matter.

(f) Records regarding postal savings accounts.

(g) Records regarding money orders. [21 F. R. 2683, Apr. 26, 1956].

Sec. 4.4 Available records. • • • •

(e) Compliance with summons. (1) A postmaster or other postal employee will comply with a summons requiring his appearance in court. He will not testify as to names and addresses of post office patrons, mail matter, postal savings accounts, or money orders unless he is specifically directed to do so by the court after first calling attention of the court to this regulation.

(2) Postal inspectors and other employees having possession of inspectors' reports or Inspection Service records are prohibited from presenting such reports, records, or information in a State court or for the use of parties to a suit or habeas corpus proceedings in a Federal court, if the United States is not a party in interest. They will inform the parties interested that the regulations of the Post Office Department prohibit them from furnishing official reports, records or information direct unless authorized by the Department. Should an attorney for a private litigant attempt to compel an employee to disclose sources of official information or similar privileged matter, the employee will decline to produce the information or matter and state that it is privileged and can not be disclosed without specific approval from the Department.

(3) When appearing as a witness for the United States in Federal grand jury proceedings, criminal prosecutions of violations of postal laws, suits brought by the United States, or other actions in which the United States is a party in interest, postal inspectors and other officers and employees will testify as to their knowledge of the facts in the matter involved. With respect to privileged matters, each case must be given individual consideration as it arises. The Department will offer every possible assistance to the courts, but the question of disclosing privileged information is a matter entirely in the discretion of the head of the Department.

[Paragraph (e) amended, 21 F. R. 1834, Mar. 24, 1956]

POSTAL MANUAL

Part 311.6—Mail Matter.

Furnish information concerning mail or mailing permits to postal inspectors and to the sender, the addressee, or the authorized representative of either on proper identification. Do not give such information to others. . . .

Part 311.7—Concerning Fugitives.

Furnish to officers of the law, on proper identification, information regarding the addresses, return cards, or postmarks on mail to aid in the apprehension of fugitives from justice. Report the action immediately to the post office inspector in charge if the information furnished relates to a violation of the postal laws.

Part 831.44—Mail Cover.

Requests by postal inspectors in charge and postal inspectors for information regarding the addresses, return cards, or postmarks on mail, must be treated in strict confidence and complied with carefully and accurately. In obtaining the information, do not delay delivery of the mail.

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Office-Supreme Court, U.S.
FILED
JAN 3 1961
JAMES R. BROWNING, Clerk

No. 578

In the Supreme Court of the United States

OCTOBER TERM, 1960

SAM SCHWARTZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General.
MALCOLM RICHARD WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys,
Department of Justice, Washington 25, D.C.

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gave this authority solely to postmasters and its excision, therefore, could take away authority solely from postmasters. Thus, an examination of the literal changes that were made in 1954 gives no indication that they were intended as a restriction on the authority of postal inspectors who up until that time were clearly not within their scope. It follows that part 311.6 cannot be construed as prohibiting postal inspectors from furnishing information obtained by a "mail watch" to the Department of Justice.

This conclusion is consistent with the spirit as well as the wording of the 1954 changes assuming that they were brought on by the criticism of the Special Senate Subcommittee. The Subcommittee's report did not condemn the "mail watch" procedure generally and thus, did not even by implication, suggest a general ban on its use to detect and apprehend criminals.[2] Indeed, the changes that were made would seem responsive to the criticisms that were contained in the report. Postal inspectors were given exclusive authority to furnish information of the type involved in the 1954 incident to representatives of the federal government. Postmasters, due to the excision of

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2. The conclusion of the report was as follows:

"The committee received no testimony and no evidence to indicate that mail covers were ever maintained against any other Member of the United States Senate. In fact, the testimony indicates that it has never been done on any other occasion. The committee, however, finds it almost impossible to make an exhaustive finding on this point since a conclusive determination could be made only after examining the records of every post office in the Nation.

"Your committee desires in strong language to condemn the use of mail covers by a Senate committee or its staff.

"The committee's attention was directed to certain sections of the United States Code, sections 1701, 1702, and 1703, title 18, dealing with obstruction of mails, obstruction of correspondence, and delay or destruction of mail or newspapers. This committee has no authority to refer this matter to the Attorney General of the United States, but the committee recommends that the Senate refer the testimony and exhibits to the Attorney General for such action as he deems appropriate." 101 Cong. Rec. 2564 (1955).

subsection 41.4(b), may no longer do so.[3] Ordinarily the inspectors' duties and authority would not give them occasion to even possess information such as was involved in the 1954 incident since such information would seldom concern criminal investigation or internal departmental matters. In any event, such information when available, would be channeled through the postal inspectors' office. In this way a more effective check on the indiscreet use of information concerning mail matter was provided while law enforcement procedures were left substantially unhindered.

Since there was no violation of the Postal Regulations we need not consider the question whether evidence obtained in violation of such regulations would be admissible in a federal court. The motion to suppress having been properly denied and there being no other questions presented on this appeal, the judgment of the court below must be affirmed.

---

3. The Committee report makes it plain that the offending disclosures there were made by local Postmasters and not postal inspectors.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13210.

UNITED STATES OF AMERICA

v.

SAM SCHWARTZ,

Appellant.

(District Court #19953 Cr.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: BIGGS, *Chief Judge*, and HASTIE and FORMAN, *Circuit Judges*.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

October 6, 1960.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13210.

UNITED STATES OF AMERICA
v.
SAM SCHWARTZ,
Appellant.

SUR PETITION FOR REHEARING.

Present: BIGGS, *Chief Judge*, and HASTIE and FORMAN, *Circuit Judges*.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By THE COURT:

BIGGS,
Chief Judge.

Dated: November 16, 1960.

APPENDIX D.

39 C. F. R.

Part 3—Mail Treated in Confidence [Revised]

Sec. 3.1 Mail treated in confidence: Sealed first-class mail while in the custody of the Post Office Department is accorded absolute secrecy. No persons in the Postal Service, except those employed for that purpose in dead-mail offices, may break or permit the breaking of the seal of any matter mailed as first-class mail without a legal warrant, even though it may contain criminal or otherwise unmailable matter, or furnish evidence of the commission of a crime. (R. S. 161, 396, as amended; sec. 1, 62 Stat. 782; 5 U. S. C. 22, 369, 18 U. S. C. 1717) [22 F. R. 4499, June 27, 1957.]

Part 4—Information on Postal Matters

* * *

Sec. 4.3 Privileged matter. The following records, documents, and information are privileged matter, and may not be disclosed by subordinate officers or employees of the Department without authorization:

(a) Reports of Postal Inspectors.

(b) Records of the Postal Inspection Service.

(c) Names of post office box holders.

(d) Names and addresses of post office patrons and former patrons, except as provided in Sec. 13.5 of this chapter.

(e) Records regarding mail matter.

(f) Records regarding postal savings accounts.

(g) Records regarding money orders. [21 F. R. 2683, Apr. 26, 1956].

Sec. 4.4 Available records. • • • •

(e) Compliance with summons. (1) A postmaster or other postal employee will comply with a summons requiring his appearance in court. He will not testify as to names and addresses of post office patrons, mail matter, postal savings accounts, or money orders unless he is specifically directed to do so by the court after first calling attention of the court to this regulation.

(2) Postal inspectors and other employees having possession of inspectors' reports or Inspection Service records are prohibited from presenting such reports, records, or information in a State court or for the use of parties to a suit or habeas corpus proceedings in a Federal court, if the United States is not a party in interest. They will inform the parties interested that the regulations of the Post Office Department prohibit them from furnishing official reports, records or information direct unless authorized by the Department. Should an attorney for a private litigant attempt to compel an employee to disclose sources of official information or similar privileged matter, the employee will decline to produce the information or matter and state that it is privileged and can not be disclosed without specific approval from the Department.

(3) When appearing as a witness for the United States in Federal grand jury proceedings, criminal prosecutions of violations of postal laws, suits brought by the United States, or other actions in which the United States is a party in interest, postal inspectors and other officers and employees will testify as to their knowledge of the facts in the matter involved. With respect to privileged matters, each case must be given individual consideration as it arises. The Department will offer every possible assistance to the courts, but the question of disclosing privileged information is a matter entirely in the discretion of the head of the Department.

[Paragraph (e) amended, 21 F. R. 1834, Mar. 24, 1956]

POSTAL MANUAL

Part 311.6—Mail Matter.

Furnish information concerning mail or mailing permits to postal inspectors and to the sender, the addressee, or the authorized representative of either on proper identification. Do not give such information to others. . . .

Part 311.7—Concerning Fugitives.

Furnish to officers of the law, on proper identification, information regarding the addresses, return cards, or postmarks on mail to aid in the apprehension of fugitives from justice. Report the action immediately to the post office inspector in charge if the information furnished relates to a violation of the postal laws.

Part 831.44—Mail Cover.

Requests by postal inspectors in charge and postal inspectors for information regarding the addresses, return cards, or postmarks on mail, must be treated in strict confidence and complied with carefully and accurately. In obtaining the information, do not delay delivery of the mail.

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Office Supreme Court, U.S.
FILED
JAN 3 1961
JAMES R. BROWNING, Clerk

No. 578

In the Supreme Court of the United States

OCTOBER TERM, 1960

SAM SCHWARTZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 13–21) is reported at 283 F. 2d 107. The opinion of the district court (R. 47–53) is reported at 176 F. Supp. 613.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1960 (Pet. App. B, 22). A petition for a rehearing was denied on November 16, 1960 (Pet. App. C, 23). The petition for a writ of certiorari was filed on December 12, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a prosecution for mail fraud, testimony given by victims whose names were obtained by a "mail cover" (*i.e.* by check of the return addresses appearing on envelopes) was admissible.

REGULATIONS INVOLVED

Pertinent Post Office Regulations contained in the Postal Manual, applicable to the instant case, are as follows:

> Part 311.6 MAIL MATTER
>
> Furnish information concerning mail or mailing permits to postal inspectors and to the sender, the addressee, or the authorized representative of either on proper identification. Do not give such information to others. See 123.5 and part 312 regarding correction of mailing lists.
>
> Part 311.7 CONCERNING FUGITIVES
>
> Furnish to officers of the law, on proper identification, information regarding the addresses, return cards, or postmarks on mail to aid in the apprehension of fugitives from justice. Report the action immediately to the postal inspector in charge.
>
> Part 831.44 MAIL COVER
>
> Requests by postal inspectors in charge and postal inspectors for information regarding the addresses, return cards, or postmarks on mail, must be treated in strict confidence and complied with carefully and accurately. In obtaining the information do not delay delivery of the mail. (See 311.6 and 311.7)

STATEMENT

Petitioner, who operated under the name of Direct Lines, was charged, in a 17-count indictment returned in the United States District Court for the Eastern District of Pennsylvania, with using the mails to defraud in violation of 18 U.S.C. 1341. The scheme alleged was that Direct Lines would mail a letter to the intended victims stating that, if they would send $30.00, Direct Lines would furnish the name of the winner of a horse race or a lottery numbers winner on December 15, 1958, and that, if the horse or number did not win, the $30.00 would be refunded (R. 3–4). At the trial, it was shown that the victims sent their $30.00 checks or money orders to Direct Lines in response to its invitation, that none of the horses won, and that none of the victims (with the exception of those named in counts 5 and 12) received a refund (R. 55–57, 61, 62–63). Petitioner was convicted on all counts, with the exception of counts 5 and 12 (R. 1, 54, 65), and was sentenced to imprisonment for 1 year and 1 day on each count, the sentences to run concurrently (R. 2, 66). On appeal, the conviction was affirmed (Pet. App. A, B, 13–22).

At the hearing on a pretrial motion to suppress evidence (R. 5), it appeared that between November 24, 1958, and March 12, 1959, during four periods of from 10 to 15 days, postal inspector Hillegass supervised a "mail watch" or "mail cover" upon mail addressed to Direct Lines. There was no delay in delivery of the mail, but a record was made of about 250 return addresses shown on the letters addressed to Direct Lines (R. 6–7, 12, 30, 31). Hillegass then

communicated with the senders of these letters, among whom were all the victims named in the indictment (R. 13, 15, 39–42). Government counsel admitted that without the mail watch the prosecution would not have known the names of the victims (R. 54). The district court was of the opinion that the postal regulations prohibited communication of results of the mail watch to the Department of Justice for purposes of prosecution, but denied the motion to suppress on the ground that the exclusionary rule should not apply to mere departmental regulations, as distinguished from constitutional and statutory directives (R. 47–53; 176 F. Supp. 613). The court of appeals concluded that the mail watch did not violate the postal regulations and it therefore found it unnecessary to reach the question whether the evidence would have been admissible if there had been a violation of the regulations (Pet. App. A, 13–21).

ARGUMENT

1. Petitioner's contention that the postal inspector was not authorized, under postal regulations, to turn over the results of the mail cover to the Department of Justice for purposes of prosecution is fully and correctly answered by the opinion of the court below. The pertinent regulations in effect at the time of the instant case were Parts 311.6, 311.7, and 831.44 of the Postal Manual (*supra*, p. 2). As held below, Parts 311.6 and 311.7 are addressed to postmasters, not to postal inspectors. Accordingly, although a postmaster was prohibited by Part 311.6 from giving "to others" the results of a mail cover, postal inspector Hillegass was not so prohibited. Part 831.44

(*supra*, p. 2) contemplated that postal inspectors would conduct mail covers. This is part of an inspector's duties in developing evidence in criminal cases for presentation to federal prosecutors;[1] and it would be incongruous to hold that, though a postal inspector may conduct a mail cover, he may not furnish the results to prosecutors to assist in the conviction of crime. The fact that the Postmaster General may refuse to deliver mail to one conducting a lottery or using the mail to obtain money under false pretenses (39 U.S.C. 259), and forbid payment of a postal money order to such a person (39 U.S.C. 732), does not suggest that action against the offender should be limited to such mild restraints albeit the facts warrant criminal prosecution.

Reading Part 311 in its entirety, it becomes clear that Parts 311.6 and 311.7 are addressed to postmasters, not to postal inspectors. Thus, 311.25 and 311.26 expressly refer to "postmasters", as does 312.1 (Part 312 is directly referred to in 311.6). Indeed, the very language of 311.6 directing that information concerning mail or mailing permits be furnished "to postal inspectors", sender, or addressee shows that the regulations apply to postmasters and not to inspectors. So, also, the last sentence of 311.7 relating

[1] 39 U.S.C. 963 provides: "Key positions; job descriptions; salary level. * * * (32) *Position.*—Postal Inspector—Level 12. * * * (K) In any criminal investigation, develops evidence, locates witnesses and suspects; apprehends and effects arrests of postal offenders, presents facts to United States attorney, and collaborates as required with Federal and State prosecutors in presentation before United States commissioner, grand jury, and trial court. * * *"

to information concerning fugitives directs that the action be reported "immediately to the postal inspector in charge." The regulatory scheme, in short, is that postmasters shall funnel results of a mail watch to postal inspectors and no others. The inspectors pass on such information as is necessary to carry out their statutory duty to cooperate with prosecutorial agencies.[2]

2. Even if it were assumed *arguendo* that the action of the postal inspectors in conducting the mail cover and communicating its results to the prosecutor was prohibited by postal regulations, the evidence, we believe, would be admissible.

The evidence here was not obtained as a result of misrepresentation or deception. The victims, who mailed letters with their return addresses written thereon, and the petitioner receiving them, were well aware that what was written on the outside of the letters could be freely read by the postal employees handling the mail. There was nothing secret about such information.[3] Cf. *United States* v. *Costello*, 255 F. 2d 876, 881 (C.A. 2), certiorari denied, 357 U.S. 937. There was thus no invasion of privacy or of funda-

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[2] As the court points out, this conclusion, apparent from the face of the existing regulations, is also supported by reference to the prior regulations and to the history of the changes therein (Pet. App. 14–15, 18–21).

[3] The instant case, where the postal employees merely read what was in open view on the outside of the letters, is completely unlike *Oliver* v. *United States*, 239 F. 2d 818 (C.A. 8), where first-class mail was opened in violation of statutes and postal regulations. Here there was no violation of the secrecy accorded to sealed first-class mail by 39 C.F.R. 3.1 (Pet. App. D, 24).

mental protected rights such as would warrant the adoption of a rule of exclusion. Moreover, even if one viewed disclosure of the sender's name and address as improper, it is difficult to see how the addressee could claim that as a violation of *his* privacy or protected rights.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1961.

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